STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RACHEL L. BALDWIN,

Defendant-Appellant.

UNPUBLISHED
April 15, 1997

No. 192932
Oakland County
LC No. 94-135011

Before: Hood, P.J., and Saad and T.S. Eveland,* JJ

PER CURIAM.

Defendant was originally charged with conspiracy to commit armed robbery, MCL 750.157(a); MSA 28.354(1), two counts of armed robbery, MCL 750.529; MSA 28.797, assault with intent to murder, MCL 750.83; MSA 28.278 and six counts of felony-firearm, MCL 750.227b; MSA 28.424(2), arising from a series of armed robberies committed with Andrew Yeager on September 15, 1994. Following a jury trial, defendant was convicted of two counts of felony-firearm and one count of assault with intent to rob while armed MCL 750.89; MSA 28.284. She now appeals as of right. We affirm.

In the early morning of September 15, 1994, Andrew Yeager robbed Donald Hite at gun point. Later the same night, Yeager held up Daniel Osborne at gun point. Yeager then robbed a Total gas station. Defendant drove the car during each of these incidents, and she obtained the weapon that was used in each of the incidents from her cousin's husband, Richard Wolfe. After the robbery of the Total station, a police chase ensued. During the chase, Yeager shot Waterford Police Officer Daniel McCaw, and Yeager was then shot and killed by another police officer.

I

Defendant first argues that the evidence was insufficient to convict her of both assault with intent to rob and felony-firearm. We disagree.

* Circuit judge, sitting on the Court of Appeals by assignment.

In reviewing the sufficiency of the evidence, this Court must consider the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have concluded that the elements of the crime were established beyond a reasonable doubt. *People v McCrady*, 213 Mich App 474, 484; 540 NW2d 718 (1995). A trier of fact may make reasonable inferences from the facts, if the inferences are supported by direct or circumstantial evidence. *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992).

A

Defendant argues that the evidence presented was insufficient to convict her on count II of the information, felony-firearm, because the underlying felony was conspiracy to commit armed robbery, and the conspiracy charge was dismissed. This argument has no merit. The first amended information, filed on June 14, 1995 to comport with the dismissal of the conspiracy related charges, indicates that count II was a charge of felony-firearm in connection with assault with intent to commit murder.

Defendant was convicted of two counts of felony-firearm relating to the assault with intent to murder of Officer McCaw and the assault with intent to rob while armed of Daniel Osborne. A conviction of felony firearm requires that the defendant possessed a firearm during the commission or attempted commission of a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Although a felony must be committed, a felony-firearm conviction does not require that the defendant be convicted of the underlying felony. *People v Jeff Davis*, 196 Mich App 597, 601; 493 NW2d 467 (1992). A conviction for aiding and abetting felony-firearm "must be supported by evidence that the defendant procured, counselled, aided, or abetted and assisted in obtaining possession of the firearm or that the defendant so assisted in retaining such possession otherwise obtained." *People v Bruno*, 115 Mich App 656, 657-658; 322 NW2d 176 (1982).

Here, the prosecution presented evidence that defendant knew that Wolfe owned a handgun. Defendant frequently visited Wolfe's house, and was there on September 13, 1994, the day before the crimes at issue occurred. Wolfe noticed that his handgun was missing after he heard about the robberies involving defendant and Yeager. Wolfe's handgun was identified as the weapon used in the assault with intent to murder Officer McCaw. Viewed in a light most favorable to the prosecution, a reasonable trier of fact could have found from this evidence that defendant procured the firearm used in the assaults against McCaw and Osborne. The prosecution also presented evidence that defendant drove the car involved in each incident, and that defendant did not stop for the police. Therefore, the evidence was sufficient to convict defendant of felony-firearm in connection with assaults of McCaw and Osborne. *McCrady*, 213 Mich App at 484.

B

Defendant next argues that the evidence was insufficient to convict her of assault with intent to rob while armed of Daniel Osborne because there was no evidence of intent. An essential element required to convict defendant as an aider or abettor is that defendant intended commission of the crime or had knowledge that the principal intended its commission at the time she gave the aid or encouragement. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). A conviction of assault with intent to rob requires proof of specific intent, which may be inferred from the surrounding facts. *People v Harris*, 110 Mich App 636, 641; 313 NW2d 354 (1981).

Defendant claims the evidence was insufficient that she intended the commission of the assault or was aware of Yeager's intent. However, we find that the jury could reasonably have inferred that Yeager intended to rob Osborne when he approached Osborne in the parking lot with a gun and asked him for the money for his brother's truck. Furthermore, the evidence was sufficient to support an inference that defendant either intended that the crime take place or knew of Yeager's intent. Defendant was present when Yeager committed armed robbery against Donald Hite prior to the assault on Osborne. The prosecution presented evidence to support an inference that defendant obtained the weapon and the vehicle used in the assault. Furthermore, defendant herself testified that she and Yeager intended to obtain bail money for a friend who was in jail in connection with a shooting that occurred the day before at the Clintonville Market. From this evidence, a reasonable trier of fact could have determined that defendant either intended that the robbery occur, or that she knew of Yeager's intent to commit robbery. Therefore, the evidence was sufficient to support defendant's conviction of assault with intent to rob.

II

Defendant next argues that it was reversible error for the trial court to admit evidence of an unrelated assault which took place at the Clintonville Market the previous day and in which defendant was not involved. Defendant argues that this evidence was inadmissible "under any theory." We disagree.

Defendant first argues that the prosecution did not articulate any reason for offering the evidence other than to show Yeager's criminal propensity and to imply defendant's guilt by association. She contends that the evidence was irrelevant to any charge against her because she did not participate in the prior incident, and did not even know that it had occurred. We disagree. The fact that Yeager used Wolfe's weapon on September 13 makes it more likely that defendant obtained Wolfe's weapon when she went to his house with Yeager on the 13th, which was an issue in the felony-firearm charges against defendant. Therefore, the evidence was relevant. MRE 401.

Defendant argues that, even if the evidence was relevant, its probative value was substantially outweighed by the danger of unfair prejudice, and therefore must be excluded under MRE 403. This Court cannot say that the evidence was unfairly prejudicial or that an unprejudiced person would find no justification for the trial court's finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Therefore, the trial court did not abuse its discretion in admitting evidence of the September 13 shooting.

III

Defendant next asserts that she was denied due process of law and her Fifth Amendment right to remain silent because the prosecutor argued that her duress defense should not be credited because she failed to assert her defense to the police, after she was arrested. Although defendant failed to object to the prosecutor's comments below, appellate review is nevertheless appropriate where a significant constitutional question is involved. *People v Schollaert,* 194 Mich App 158, 162; 486 NW2d 312 (1992).

In general, the credibility of a witness may be attacked by showing that he failed to speak or act when it would have been natural to do so, *People v Martinez,* 190 Mich App 442, 446; 476 NW2d 641 (1991), although an accused's silence may not be used against him. *People v Bobo,* 390 Mich 355, 359-361; 212 NW2d 190 (1973). Also, a defendant's post-arrest silence may be used to rebut defendant's claim that her first opportunity to tell her side of the story was at trial. *People v Crump,* 216 Mich App 210, 215; 549 NW2d 36 (1996); *People v Allen,* 201 Mich App 98, 103; 505 NW2d 869 (1993).

At trial, defendant testified that her participation in the robberies was under duress, and that Yeager held a gun to her side when the police were pursuing them. After the police stopped her car, she testified that the police did not permit her to make a statement, and they said "shut up or we'll blow your brains out." Officer Nicole Hickson testified in rebuttal that police never threatened defendant or told her not to make a statement, and that the only comment defendant made was a request for cigarettes. As in *Allen* and *Crump*, the defense opened the door to the prosecution's comments on defendant's failure to assert duress as a defense. Accordingly, the prosecutor's comments were proper.

IV

Defendant raises numerous challenges to her sentence.

A

Defendant first contends that she should be resentenced because, despite the fact that the jury acquitted her of several charges, the trial court still considered her guilty of these charges at sentencing. A sentencing judge may consider the facts underlying uncharged offenses, pending charges, and acquittals. *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991). However, a court may not make an independent finding of guilt of a crime other than that for which the defendant is being sentenced. *Id*. at 427-428. Similarly, although a sentencing judge may not punish a defendant for perjury, "when the record contains a rational basis for the trial court's conclusion that the defendant's testimony amounted to willful, material, and flagrant perjury, and that such misstatements have a logical bearing on the question of the defendant's prospects for rehabilitation, the trial court properly may consider this circumstance in imposing sentence." *People v Adams*, 430 Mich 679, 689, 696; 425 NW2d 437 (1988).

Based on the record, it does not appear that the trial judge found defendant guilty of offenses for which she was acquitted, but rather considered the facts underlying the offenses for which she was acquitted, which is permitted under *Newcomb*, 190 Mich App at 427. In addition, the record contains a rational basis for the trial court's conclusion that the defendant's testimony amounted to willful, material, and flagrant perjury. Accordingly, the court did not consider inappropriate factors in rendering its sentence.

B

Finally, defendant argues that she is entitled to resentencing because her sentence was disproportionate. Because defendant's sentence was within the guidelines, it is presumed proportionate. In support of her argument that her sentence was disproportionate, defendant stresses her "tender years," her lack of prior criminal record, and her limited role in the crime for which she was convicted. The sentencing information report reflects that the court considered defendant's role in the crime and her lack of prior criminal record according to the guidelines.[1] Defendant has not alleged any unusual circumstances that would overcome the presumption that her sentence was proportionate. Therefore, the trial court did not abuse its discretion in imposing sentence.

Affirmed.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Thomas S. Eveland

[1] Defendant was assessed a prior record score of zero. She was assessed a score of zero under offense variable 9, which provides that an offender who is a leader in a multiple offender situation should be assessed ten points, and one who is not a leader should be assessed zero points.